A

MINTYE PROPERTIES SDN BHD

v.

YAYASAN MELAKA

B

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
ABDUL AZIZ MOHAMAD JCA
MOHD GHAZALI MOHD YUSOFF JCA
[CIVIL NO: M-02-623-2004]

C

28 AUGUST 2006

CONTRACT: *Formation - Dispensation - Contract to purchase and develop land - Performance thereof - Whether could be dispensed with - Seller imposing new term after contract executed - Whether tantamount to*

D

making new contract - Whether original contract aborted - New term not accepted by purchaser - Whether could withdraw from contract - Whether could recover monies paid therefor - Contracts Act 1950, ss. 40, 64

E

By a sale and purchase agreement dated 27 November 1995, the plaintiff agreed to purchase a piece of land from the defendant for RM33,308,589 for the purpose of developing it into a housing project. Having executed the agreement, the plaintiff paid 60% of the purchase price. It was a term of the agreement that the plaintiff was not bound to pay the balance price until Form G

F

under the Land Acquisition Act 1960 was issued by the Land Office. By letter dated 29 May 1996, the defendant informed the plaintiff of the State Government's decision to impose a quota on the project (effectively binding the plaintiff to sell the housing units only to Bumiputras), and gave the plaintiff two weeks to decide

G

whether to proceed with the project. By letter dated 14 August 1996, the plaintiff proposed an alternative quota, and subsequently, by letter dated 10 September 1996, intimated its willingness to complete the project if the alternative quota was accepted. The defendant, however, did not accept the alternative

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quota, and so, by letter dated 10 December 1997, the plaintiff withdrew from the project and asked for a refund of the monies it paid the defendant. The defendant alleged breach of contract and in the event invoked the forfeiture clause in the agreement (cl. 9.1) and forfeited 10% of the purchase price. The plaintiff

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applied to the High Court to recover the forfeited sum, but the application was dismissed on the grounds that: (i) the quota was within the contemplation of the parties and was validly imposed bearing in mind cls. 1.1, 6(g) and 7(b) of the agreement; (ii) the

plaintiff was in breach of the agreement when it withdrew from the project; (iii) clause 9.1 was properly invoked by the defendant; and (iv) the agreement could not have been dispensed with under s. 64 of the Contracts Act 1950, such dispensation being barred by cl. 10 of the agreement. Aggrieved, the plaintiff appealed.

Held (allowing the appeal):
Per Gopal Sri Ram JCA

(1) As at 29 May 1996, the plaintiff had done all that was required of it. The plaintiff had paid 60% of the purchase price and needed only to pay the remaining 40%. However, that balance sum never fell due since Form G had never been issued. The plaintiff was not in breach of its obligations under the agreement and cl. 9.1 had not therefore been triggered. (para 6)

(2) The act of the defendant in introducing a new term into the contract and insisting on its compliance was a clear breach of contract. The defendant was not entitled to do what it did. Clearly, by seeking to introduce an obligation that did not theretofore exist, the defendant was imposing on the plaintiff a contract altogether different from the agreement of 27 November 1995. The defendant was in short imposing a new contract. (para 7)

(3) In the state of affairs in which the plaintiff found itself on 29 May 1996, it had a choice whether to treat the contract as at an end or elect to perform the new contract in accordance with s. 40 of the Contracts Act 1950. (para 10)

(3a) On the facts, there was no express or implied election by the plaintiff to treat the contract as at an end. The plaintiff also did not affirm the original contract of 27 November 1995. What it did was to ask for a revised version of the new contract imposed by the defendant. The plaintiff, thus, was making a new contract, albeit its "new contract" was different from the "new contract" imposed by the defendant. Be that as it may, the parties, by their conduct, had mutually put an end to the original contract and that contract ceased to exist with effect from the plaintiff's letter of 10 September 1996. (para 16)

(4) By virtue of s. 64 of the Contracts Act 1950, it was open to the parties here to informally dispense with or remit the performance of the original contract. It follows that the defendant could not rely on cl. 9.1 of the original agreement because the original contract had come to an end and cl. 9.1 fell with it. The defendant could also not rely on its letter of 29 May 1996, because that letter had been rejected and had come to an end by reason of the plaintiff's counter offer. The two weeks period fell with it and was no longer available for the defendant to take advantage of. (paras 17 & 19)

Abdul Aziz Mohamad JCA (concurring):

(1) The plaintiffs had made the first two payments totalling RM19,985,153.40. As regards the third payment, it was an agreed fact that Form G was never issued. Therefore, up to the date of trial, the plaintiffs were never obliged to make the third payment. (para 27)

(2) The problem here arose from the State Government's decision to impose an all-Bumiputra quota on the project. But where a binding agreement has been entered into, as here, such a quota cannot be validly imposed without the agreement of the developer (plaintiff). As for the learned judge's reliance on cls. 6(g) and 7(b) of the agreement, by no stretch of the imagination would one be able to see from those provisions a contemplation of the imposition of the quota. As for cl. 1.1, that provision was to ensure that it be understood that existing conditions of title would continue to run with the said lands. It would not enable the defendants to prevail upon the State Government to include in the titles of the said lands, a condition of title that did not exist when the agreement was entered into. (para 38)

(3) Clause 10 of the agreement gave a party the right to insist on strict performance of a term or condition notwithstanding his knowledge of or acquiescence in its breach. However, reliance on cl. 10 was a poor answer to the dispensation argument because, by its very nature, a right, such as that given by cl. 10, cannot turn into a disability. Clause 10 was not capable of disabling the defendants from exercising the right to give dispensation given by s. 64 of the Contracts Act

1950. There being no viable argument against it, the dispensation argument had to prevail. The appeal, therefore, must be allowed. (paras 40 & 41)

(3a) Clause 9.1 was not applicable in the circumstances of this case. One of the grounds for forfeiture in cl. 9.1, and which was relied on by the defendants, was the event of the plaintiffs defaulting any payment of the balance of the purchase price. However, there had been no default by the plaintiffs to pay the purchase price. The balance of 40% was not due because Form G had not been issued. (para 42)

Bahasa Malaysia *translation of headnotes*

Melalui satu perjanjian jual beli bertarikh 27 November 1995, plaintif bersetuju untuk membeli sebidang tanah dari defendan pada harga RM33,308,589, untuk tujuan membangunkan sebuah projek perumahan di situ. Setelah memeterai perjanjian, plaintif membayar 60% harga belian tanah tersebut. Menjadi satu syarat perjanjian bahawa plaintif tidak perlu membayar baki harga selagi Borang G di bawah Akta Pengambilan Tanah 1960 tidak dikeluarkan oleh Pejabat Tanah. Melalui surat bertarikh 29 Mei 1996, defendan memberitahu plaintif mengenai keputusan Kerajaan Negeri mengenakan kuota terhadap projek (secara berkesannya menuntut plaintif menjual seluruh unit rumah kepada Bumiputra sahaja), dan memberikan dua minggu kepada plaintif untuk memutuskan sama ada hendak meneruskan projek ataupun tidak. Melalui surat bertarikh 14 Ogos 1996, plaintif mencadangkan satu kuota alternatif, dan berikutnya, melalui surat bertarikh 10 September 1996, menyatakan kesediaannya untuk menyempurnakan projek jika kuota alternatif diterima. Defendan, bagaimanapun, tidak menerima kuota alternatif, dan melalui surat bertarikh 10 Disember 1997, plaintif menarik diri dari projek dan meminta supaya wang yang telah dibayar kepada defendan dikembalikan. Defendan mendakwa telah berlaku pelanggaran kontrak, dan atas alasan itu, telah merampas 10% dari harga belian berdasarkan fasal rampasan di dalam perjanjian (fasal 9.1). Plaintif memohon kepada Mahkamah Tinggi untuk mendapat kembali wangnya, tetapi permohonannya telah ditolak atas alasan: (i) pengenaan kuota adalah sah dan dalam jangkaan pihak-pihak mengambil kira fasal-fasal 1.1, 6(g) dan 7(b) perjanjian; (ii) plaintif telah melanggar perjanjian apabila menarik diri dari projek; (iii) fasal 9.1 telah digerakkan oleh defendan dengan teratur; dan (iv) perjanjian tidak boleh dilepaskan di bawah s. 64 Akta Kontrak 1950 kerana pelepasan sedemikian adalah dilarang oleh fasal 10 perjanjian. Terkilan, plaintif merayu.

Diputuskan
Oleh Gopal Sri Ram HMR:

(1) Setakat 29 Mei 1996, plaintif telah melakukan segala apa yang dikehendaki darinya. Plaintif telah membayar 60% harga belian dan hanya perlu membayar baki 40% lagi. Namun, jumlah baki tersebut tidak menjadi terbayar kerana Borang G tidak dikeluarkan. Plaintif tidak melakukan apa-apa pelanggaran obligasi dan fasal 9.1, dengan itu, tidak boleh digerakkan.

(2) Tindakan defendan memperkenalkan terma baru ke dalam kontrak dan menuntut pematuhan kepadanya adalah satu perbuatan yang melanggar kontrak. Defendan tidak berhak melakukan apa yang dilakukannya. Jelas bahawa, dengan mengkehendaki supaya dimasukkan satu obligasi yang tidak wujud sebelumnya, defendan mengenakan kepada plaintif suatu kontrak yang berlainan dari kontrak bertarik 27 November 1995. Defendan dengan kata lain telah memperkenalkan satu kontrak baru.

(3) Dalam keadaan yang wujud pada 29 Mei 1996, plaintif mempunyai pilihan sama ada untuk menganggap kontrak sebagai telah berakhir atau memilih untuk menyempurnakan kontrak berdasarkan s. 40 Akta Kontrak 1950.

(3a) Di atas fakta, plaintif tidak membuat pilihan sama ada secara nyata atau tersirat untuk menganggap kontrak sebagai telah berakhir. Plaintif juga tidak mengesahkan kontrak asal bertarikh 27 November 1995. Apa yang dilakukan plaintif adalah meminta untuk meminda kontrak baru yang dikenakan oleh defendan. Plaintif, dengan itu, telah membuat suatu kontrak baru, walaupun "kontrak baru"nya itu berbeza dari "kontrak baru" yang diperkenalkan defendan. Apapun, melalui kelakuan mereka, pihak-pihak telah secara bersama menamatkan kontral asal di mana kontrak asal telah berakhir bermula dari surat plaintif bertarikh 10 September 1996.

(4) Berdasarkan s. 64 Akta Kontrak 1950, adalah terbuka kepada pihak-pihak di sini untuk melepaskan pelaksanaan kontrak asal. Ianya mengikut bahawa defendan tidak boleh bergantung kepada fasal 9.1 kontrak asal kerana kontrak asal telah ditamatkan sekaligus menamatkan fasal 9.1 tersebut. Defendan juga tidak boleh bergantung kepada surat bertarikh 29 Mei 1996, kerana surat tersebut telah ditolak oleh

cadangan balas plaintif dan tidak lagi berkesan. Tempoh dua minggu di dalam surat tersebut tamat dengan sendirinya dan tidak lagi boleh diambil manfaat oleh defendan.

Oleh Abdul Aziz Mohamad HMR (menyetujui):

(1) Plaintif telah membuat dua pembayaran pertama berjumlah RM19,985.153.40. Berkaitan bayaran ketiga, fakta menunjukkan bahawa Borang G tidak pernah dikeluarkan. Oleh yang demikian, sehingga ke tarikh perbicaraan, plaintif tidak menanggung obligasi untuk membuat pembayaran ketiga tersebut.

(2) Masaalah di sini berbangkit dari keputusan Kerajaan Negeri untuk mengenakan kuota Bumiputra yang menyeluruh ke atas projek. Bagaimanapun, di mana suatu perjanjian mengikat telah dimeterai, seperti halnya di sini, kuota sedemikian tidak boleh dikenakan dengan sahnya tanpa persetujuan pemaju (plaintif). Berhubung pergantungan yang arif hakim ke atas fasal-fasal 6(g) dan 7(b) perjanjian, fasal-fasal tersebut sekali-kali tidak memberi gambaran bahawa kuota boleh dijangka akan dilaksanakan. Mengenai fasal 1.1, peruntukan ini hanyalah untuk mempastikan bahawa ianya difahami bahawa syarat-syarat semasa hakmilik akan terus kekal bersama tanah. Ia tidak membolehkan defendan untuk mempengaruhi Kerajaan Negeri supaya memasukkan ke dalam dokumen hakmilik tanah, suatu syarat yang tidak wujud ketika perjanjian dimeterai.

(3) Fasal 10 perjanjian memberi hak kepada sesuatu pihak yang mempunyai pengetahuan atau menerima pelanggaran terma atau syarat untuk terus menuntut pelaksanaan ketat terma atau syarat tersebut. Apapun, fasal 10 tidak boleh dijadikan tempat bergantung untuk menjawab hujah pelepasan kerana, atas sifatnya, sesuatu hak, seperti hak yang diberi oleh fasal 10, tidak boleh bertukar menjadi suatu ketidak-upayaan. Fasal 10 tidak boleh menjadi penghalang kepada defendan untuk melaksanakan haknya untuk membuat pelepasan sepertimana yang diberikan kepadanya oleh s. 64 Akta Kontrak 1950. Dengan ketiadaan hujah menentang yang kuat terhadapnya, hujah pelepasan hendaklah dipakai. Sekaligus, rayuan harus dibenarkan.

(3a) Fasal 9.1 tidak terpakai dalam halkeadaan kes di sini. Salah satu dari alasan bagi perampasan di fasal 9.1, yang defendan bergantung kepadanya, adalah keingkaran plaintif untuk membayar baki harga belian. Bagaimanapun, tidak ada kemungkiran di pihak plaintif untuk membayar harga belian. Baki bayaran 40% tidak menjadi terbayar kerana Borang G tidak dikeluarkan.

Case(s) referred to:

ABB Distribution Sdn Bhd v. GKM Development Development Sdn Bhd [1998] 1 CLJ 1053 HC ***(refd)***

Choo Yin Loo v. Visuvalingam Pillay [1930] 7 FMSLR 135 ***(refd)***

Desa Teck Guan Koko Sdn Bhd v. Syarikat Huo Foh Hing [1994] 3 CLJ 172 HC ***(refd)***

Freeth v. Burr [1874] LR 9 CP 208 ***(refd)***

Ganam v. Somoo Sinniah [1984] 2 CLJ 268; [1984] 1 CLJ (Rep) 123 FC ***(refd)***

General Billposting Co Ltd v. Atkinson [1909] AC 118 ***(refd)***

Gibson v. Manchester City Council [1979] 1 WLR 294 ***(refd)***

Hyde v. Wrench [1840] 49 ER 132 ***(refd)***

Pan Ah Ba v. Nanyang Construction Sdn Bhd [1969] 2 MLJ 181 ***(refd)***

Rasiah Munusamy v. Lim Tan & Sons Sdn Bhd [1985] 1 CLJ 541; [1985] CLJ (Rep) 266 FC ***(refd)***

Sargent v. ASL Developments Ltd [1974] 131 CLR 634 ***(refd)***

Sooltan Chund v. Schiller [1878] ILR 4 Cal 252 ***(refd)***

Suisse Atlantique Societe d'Armament Maritime SA v. NV Rotterdamsche Kolen Centrale [1967] 1 AC 361 ***(refd)***

Tan Hock Chan v. Kho Teck Seng [1980] 1 MLJ 308 ***(refd)***

Trollope & Colls Ltd v. Atomic Power Constructions [1962] 2 All ER 1035 ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 40, 64

Other source(s) referred to:

Chitty on Contracts, 26th edn, para 1702

For the appellants - Cyrus Das (Kelvin Chow with him); M/s Allen Gledhill & Ball

For the respondents - Muhammad Naguib Ahmad (Yahya Abdul Rahman with him); M/s Abu Seman & Co

[Appeal from High Court, Melaka; Suit No: 22-119-1999]

Reported by WA Sharif

JUDGMENT

Gopal Sri Ram JCA:

[1] This is the plaintiff's appeal against the dismissal of its suit to recover the 10% deposit that had been forfeited by the defendant. The factual narrative may be shortly stated.

[2] On 27 November 1995, the plaintiff entered into an agreement with the defendant (a statutory body established under the Malacca Foundation Enactment 1984). By that agreement the plaintiff purchased 147.05 acres of land in Bachang, Melaka from the defendant for a sum of RM33,308,589. There is a supplementary agreement of the same date. But nothing turns on it. So I will not refer to it at all in this judgment. It was a term of the agreement that the plaintiff shall develop the land in question and construct commercial, industrial and residential units on it for sale to the public. But the agreement did not specify the community of persons to whom the units may be sold or provide for any ratio of such community.

[3] The plaintiff fulfilled its part of the bargain by paying RM19,985,153.40 as required by cl. 2 of the agreement. This represents 60% of the purchase price. The agreement also required the plaintiff to obtain the approval of the Foreign Investment Committee (FIC). That approval was obtained.

[4] On 29 May 1996 the defendant wrote a letter to the plaintiff. In it the defendant informed the plaintiff that the State EXCO of Melaka had decided that all the units to be constructed must be sold only to Bumiputras. The plaintiff was given two weeks to decide whether it was prepared to go on with the project on the basis of this quota. This was a new requirement as the agreement does not contain any such term. Neither does the agreement contain a term permitting the defendant to unilaterally vary the terms of the contract. For completeness I would mention that the defendant had itself been intimated of the EXCO's decision on 24 May 1996 as evidenced by the letter at p. 291 of the record of appeal provided to us.

[5] What followed was an exchange of correspondence between the plaintiff and the defendant stretching over a period of about 18 months. The plaintiff asked for and was granted time to consider the new term that was being sought to be introduced

into the existing contract between the parties. By a letter dated 14 August 1996 plaintiff appealed to the defendant to have the quota reduced in accordance with the proposal contained in that letter. The plaintiff wrote again on 10 September 1996 saying that in the event that the alternative quota suggested by it was accepted, it was prepared to complete the project. It was not until 29 October 1997 that the defendant responded. In its letter of that date, it enclosed a letter from the Melaka Tengah District and land office which informed of a reduction of the quota but not to the extent required by the plaintiff. A few days later, on 10 November 1997, the plaintiff once again appealed to have the quota reduced in terms of its proposal as set out in that letter. Having received no response to that letter, the plaintiff wrote on 10 December 1997, stating that it was not interested in proceeding with the project. In that letter, it accepted the defendant's offer to withdraw from the project and asked for a refund of the RM 19,985,153.40. The defendant responded only on 9 February 1998. It said that it the plaintiff's withdrawal from the project and the legal effect and implications of such withdrawal. In reply the plaintiff in its letter dated 14 February 1998 contended that the withdrawal was not its proposal but an acceptance of the defendant's proposal. Matters came to a head when the defendant in its letter of 4 June 1998 (at p. 216 of the appeal record), informed the plaintiff of its decision to rescind the agreement and forfeit RM3,330,858.90 being 10% of the purchase price. Such forfeiture was provided for in clause 9.1 which confers that right on the defendant in the event of the plaintiff's breach of its obligation to pay the sums due under the agreement. The letter of 4 June 1998, however, makes it plain that the defendant's justification for terminating the agreement and forfeiting the 10% deposit was based on the plaintiff's failure to respond within the two weeks specified in the defendant's letter of 29 May 1996.

[6] There is one matter which it is convenient to mention at this stage. It is this. As at the date of letter of 29 May 1996 the plaintiff had already paid 60% of the purchase price. It had also applied for and obtained approval from the FIC. All that it needed to do was to pay the remaining 40% of the purchase price. But that sum was not due until the relevant Land Office had issued Form G under the Land Acquisition Act 1960 as provided for in cl. 2(c) of the agreement. (See, p. 177 of the appeal record.) And

that had not happened. So in real terms, as at 29 May 1996, there was nothing left for the plaintiff to do. It had done all that was required of it. In short, the plaintiff was not in breach of its obligations under the agreement and cl. 9.1 had not been triggered.

[7] In my judgment, the act of the defendant in introducing a new term into the contract and insisting on its compliance was a clear breach of contract. It was not, as I have earlier said, entitled to do what it did because there was no term in the agreement that allowed it to so. Also, what the defendant demanded performance of was a new contract, having thrown overboard the old contract. I say "new contract" because the term that the sale of the units shall be solely to bumiputras was not in the agreement of 27 November 1995. Under that agreement the plaintiff had freedom to sell to whomsoever it chose. By seeking to introduce an obligation that did not theretofore exist, the defendant was imposing on the plaintiff a contract altogether different from the agreement of 27 November 1995. In short, a new contract.

[8] To paraphrase in less eloquent language the words of Mohamed Azmi SCJ in *Rasiah Munusamy v. Lim Tan & Son s Sdn Bhd* [1985] 1 CLJ 541; [1985] CLJ (Rep) 266, there was an absolute refusal on the part of the defendant to be bound by the original contract (*Freeth v. Burr* [1874] LR 9 CP 208 at p 214). And, in any event, the action of the defendant is – to quote from the same learned judge in that case – "such as to lead a reasonable person to conclude that he no longer intends to be bound by its provisions."

[9] But a breach is not an actionable breach unless it is accepted by the innocent party to the contract – here the plaintiff. As Seah FJ observed in *Ganam v. Somoo Sinniah* [1984] 2 CLJ 268; [1984] 1 CLJ (Rep) 123:

> A wrongful repudiation by one party cannot, except by the election of the other party, so to treat it, put an end to an obligation; if the other party still insists on performance of the contract the repudiation is what is called brutum fulmen that is, the parties are left with their rights and liabilities as before. A wrongful repudiation of a contract by one party does not of itself absolve the other party if he sues on the contract from

establishing his right to recover by proving performance by him of conditions precedent (per Lord Wright in *Edridge v. Sathna* [1933] 60 IA 363].

[10] So in the state of affairs in which the plaintiff found itself on 29 May 1996, it had a choice: either to treat the contract as at an end or to elect to perform the new contract. This is in accordance with s. 40 of the Contracts Act 1950 which reads:

> When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

It has been held that the section merely re-enacts English common law. See, *Sooltan Chund v. Schiller* [1878] ILR 4 Cal 252; *Choo Yin Loo v. Visuvalingam Pillay* [1930] 7 FMSLR 135.

[11] For an election to be effective and binding, the innocent party must by words or conduct communicate his decision to the contract breaker. In other words it may be express or implied from conduct. To quote Mason J (later CJ Australia) in *Sargent v. ASL Developments Ltd* [1974] 131 CLR 634 at p 655:

> Essential to the making of an election is communication to the party affected by words or conduct of the choice thereby made and it is accepted that once an election is made, it cannot be retracted (*The Queen v. Paulson* [1921] 1 AC 271 at p 284; *Tropical Traders Ltd v. Goonan* [1964] 111 CLR 41 at p 55). No doubt this rule has been adopted in the interests of certainty and because it has been thought to be fair as between the parties that the person affected is entitled to know where he stands and that the person electing should not have the opportunity of changing his election and subjecting his adversary to different obligations.

[12] Absent an express election, the test for deciding whether the innocent party elected one way or the other is objective. Put another way, it is for the court to infer from the surrounding circumstances of each case as to whether the innocent party elected to affirm in the continuance of the contract or to treat the contract as at an end. So, if, for example, a buyer informs a seller that he will not accept the goods sold and the seller nevertheless attempts delivery, this latter act may be held to be conduct evincing an intention to affirm the contract because the seller is exercising his rights under the contract. See, *ABB Distribution Sdn*

Bhd v. GKM Development Development Sdn Bhd [1998] 1 CLJ 1053. However, "Mere inactivity after breach does not of itself amount to affirmation, nor (it seems) does the commencement of an action claiming damages for breach." See, *Chitty on Contracts*, 26th ed at para. 1702, citing *General Billposting Co Ltd v. Atkinson* [1909] AC 118. See also *Desa Teck Guan Koko Sdn Bhd v. Syarikat Huo Foh Hing* [1994] 3 CLJ 172, per Ian Chin J.

[13] To quote once again from Mason J in *Sargent v. ASL Developments Ltd*:

> If a party to a contract, aware of a breach going to the root of the contract, or of other circumstances entitling him to terminate the contract, though unaware of the existence of the right to terminate the contract, exercises rights under the contract, he must be held to have made a binding election to affirm. Such conduct is justifiable only on the footing that an election has been made to affirm the contract; the conduct is adverse to the other party and may therefore be considered unequivocal in its effect. The justification for imputing to the affirming party a binding election in these circumstances, though he be unaware of his alternative right, is that, having a knowledge of the facts sufficient to alert him to the possibility of the existence of his alternative right, he has acted adversely to the other party and that, by so doing, he has induced the other party to believe that performance of the contract is insisted upon. It is with these considerations in mind that the law attributes to the party the making of a choice, though he be ignorant of his alternative right. For reasons stated earlier, the affirming party cannot be permitted to change his position once he has elected.

[14] On the other hand, if, for example, the innocent party issues a writ against the contract breaker, that act may be treated as being sufficient evidence of an intention on the part of the former to treat the contract as at an end and a sufficient communication of that intention to the latter. See, *Tan Hock Chan v. Kho Teck Seng* [1980] 1 MLJ 308, where Chang Min Tat FJ said that it was:

> a notice of rescission when the contractor served the writ and statement of claim herein on the developer and that by his statement of defence, the developer had accepted such a notice as effectively terminating the contract between the parties.

[15] Paragraph 1702 in *Chitty on Contracts*, 26th ed which I quoted earlier goes on to say that:

> Affirmation must be total: the innocent party cannot approbate and reprobate by affirming part of the contract and disaffirming the rest, for that would be to make a new contract.

The editors cite *Suisse Atlantique Societe d'Armament Maritime SA v. NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361, to support this proposition. In that case, Lord Reid said (at p. 398):

> Where the contract has been affirmed by the innocent party, at first sight the position is simple. You must either affirm the whole contract or rescind the whole contract: you cannot approbate and reprobate by affirming part of it and disaffirming the rest - that would be making a new contract.

[16] Apply the foregoing principles to the facts here. There was no express election by the plaintiff to treat the contract as at an end. Was there an implied election? I do not think there was. What the plaintiff did was to ask for a revised version of the new contract imposed by the defendant. That is clear from the exchange of correspondence to which I have referred. Neither, in my judgment, was there any acquiescence by the plaintiff in the continuation of the contract. It was also making a new contract; but it was a different "new contract" from the "new contract" imposed by the defendant. Put another way, the plaintiff did not affirm the original contract of 27 November 1995. But what is fairly clear is that the parties had by their conduct mutually put an end to the original contract and that contract ceased to exist with effect from 10 September 1996, being the date of the plaintiff's letter by which it informed the defendant that it was willing to carry out and complete the project in the event its appeal for reduction of the quota was accepted by the EXCO.

[17] Let me say at once that no further formality was necessary to bring the original contract to an end. In this respect our law is different from English common law. In my view, because of s. 64 of the Contracts Act 1950 it was open to the parties here to informally dispense with or remit the performance of the original contract. In this context I need do no more than quote the following passage from the judgment of Azmi LP in *Pan Ah Ba v. Nanyang Construction Sdn Bhd* [1969] 2 MLJ 181:

Now as to the law on this question. Section 64(1) of the Contracts (Malay States) Ordinance, 1950 (corresponding to section 63 of the Indian Contract Act 1872) provides that every promisee may dispense with or remit wholly or in part the performance of the promise made to him. The rest of the section is irrelevant to the present question.

The Privy Council in *Chhunna Mal Ram Nath v. Mool Chand Ram Bhagat* AIR [1928] PC 99 strongly dissented from the observations of Sir Lawrence Jenkins CJ in *Abaji Sitaram Modak v. Trimbak Municipality* [1904] ILR 28 Bombay 66 where the learned Chief Justice took the view that a dispensation or remission under section 63 involved an agreement as defined by section 2(e) of the Contract Act of India. In other words, *in order to constitute a dispensation of a promise under section 63 of the Indian Contract Act, neither consideration nor an agreement is necessary provided of course that it is clear from the evidence that the promisee had so dispensed with the performance of the promise by a voluntary conscious act and it must be an affirmative act on his part.* Therefore, in my view, by the words in the letter of 20th August, 1964, namely 'Will you kindly call at our solicitor's office ... to sign the agreement within 7 days without any further delay, should you fail to comply with this notice we shall resell the above property to other purchasers on our waiting list', the defendant company had dispensed with the performance of the agreement by the deceased. The words of the letter are clear. In my view therefore, when the deceased had failed to sign the agreement as requested by the letter of 20th August, 1964, the company had dispensed her from performing her part of the contract with the result that the contract was rescinded and that the estate of the deceased is entitled to the return of the deposit as provided in paragraph 4 of the agreement P.3. (emphasis added.)

[18] Look at the facts objectively once again. What the parties here were doing was this. They were negotiating a fresh contract. As far as both were concerned, the original contract of 27 November 1995 no longer existed. In its letter of 29 May 1996 the defendant offered to make a new contract with the plaintiff. It gave the plaintiff two weeks to accept that offer. It did not make time of the essence of its offer. Further, it entertained the plaintiff's plea to revise the terms of the new contract. And the EXCO did in fact make a revision, although it was not to the extent sought by the plaintiff. What is the effect in law of all this? In my judgment, the defendant's offer to make a new contract was rejected by the counter offer contained in the plaintiff's letter

of 14 August 1996. The parties were thereafter still in negotiations. What happened then was that the plaintiff withdrew from those negotiations and asked for the money paid under the original contract of 27 November 1995.

[19] It follows that the defendant could not rely on cl. 9.1 of the original agreement because by 4 June 1998 (the date of the defendant's letter) the original contract had come to an end and cl. 9.1 fell with it. That is probably why it relied on its letter of 29 May 1996. But that letter of offer had, as I have already said, been rejected and had come to an end by reason of the plaintiff's counter offer. See, *Hyde v. Wrench* [1840] 49 ER 132; *Trollope & Colls Ltd v. Atomic Power Constructions* [1962] 2 All ER 1035; *Gibson v. Manchester City Council* [1979] 1 WLR 294. The two week period fell with it and was no longer available to the defendant to take advantage of. So the only reason advanced by the defendant both in pre-trial correspondence and at the trial constituted no justification for the forfeiture of the 10% deposit. In my judgment, there was simply no legal basis on which the defendant could forfeit the deposit it had in its hands.

[20] In conclusion I would sum up as follows:

(i) as at 29 May 1996, the plaintiff had done all that it was obliged to do under the original contract;

(ii) the defendant's letter of 29 May 1996 and the correspondence that followed it reasonably supports the strong inference that the defendant had dispensed with the performance of the original contract;

(iii) the defendant's letter of 29 May 1996 was in truth an offer to the plaintiff to enter into a new contract within two weeks from the date of that letter;

(iv) that offer was rejected by the counter offer made by the plaintiff in its letter of 14 August 1996 and was therefore terminated;

(v) thereafter the parties entered into negotiations on the terms of the proposed new contract;

(vi) in the course of negotiations the plaintiff withdrew, as it was entitled to do;

(vii) by reason of the foregoing matters, the defendant had no right whatsoever to forfeit the deposit and was bound to refund it to the plaintiff.

[21] In these circumstances, there was no option but to allow the appeal. Judgment as prayed for by the plaintiff in its pleading was entered and the other orders usually consequent upon a successful appeal were made.

[22] My learned brother Mohd Ghazali bin Mohd Yusoff JCA has seen this judgment in draft and has expressed his agreement with it.

Abdul Aziz Mohamad JCA:

[23] This was an appeal against the dismissal by the High Court of the plaintiff company's action for the refund of a sum of RM3,330,858.90 which the defendants, a body corporate established under the Malacca Foundation Enactment 1984, forfeited in reliance on cl. 9.1 of an agreement dated 27 November 1995 between the defendants and the plaintiffs.

[24] By agreement of the parties, the trial of the action became merely an exercise in construing the meaning and effect of certain agreed documents, on which, or on some of which, all the averments of fact in the statement of claim hinged. There was no giving of evidence by witnesses, but there were three agreed facts.

[25] According to the recitals to the agreement of 27 November 1995, the State Government of Malacca was desirous of promoting the development of a "parcel" of lands in the State of Malacca having a total area of 147.05 acres ("the said lands") and had commenced proceedings under the Land Acquisition Act 1960 to acquire the said lands which, after acquisition, would be alienated to the defendants under the category "Building and Commercial/Industrial", and the defendants would in turn sell them to the plaintiffs, who were desirous of purchasing them for development into "building and commercial/industrial purposes" and who were willing to undertake their development, which the State Government and the defendants had agreed to grant the plaintiffs the absolute right to do.

[26] It was an agreed fact that the Chairman of the defendants' board was the Chief Minister of Malacca, who was also the Chairman of the State Executive Council, several members of which were also members of the defendants' board.

[27] By cl. 1.1 of the agreement, the defendants as beneficial owner (since they were not yet the registered owner) agreed to sell ("purchase" in the clause being obviously an error) the said lands to the plaintiffs for RM33,308,589 which was to be paid, according to cl. 2, in three stages: RM9,992,576.70 (30%), being deposit and part payment, upon execution of the agreement; RM9,992,576.70 (30%) within three months from the date of the agreement; and RM13,323,435.60 (40%) within nine months from the date of the agreement or within 14 days of the issuance of Form G under the Land Acquisition Act 1960, whichever was the later. Form G is the written award of compensation for interests acquired under the Act. The plaintiffs had made the first two payments totalling RM19,985,153.40. As regards the third payment, although paragraph 3 of the statement of defence said that Form G had been issued on 20 August 1996, it was an agreed fact – agreed on the date of trial, 3 March 2004 – that Form G was never issued. Therefore up to the date of trial the plaintiffs were never obliged to make the third payment.

[28] Clause 5.2 of the agreement would ensure that, upon full payment of the purchase price, the plaintiffs would become the registered owner of the said lands. The agreement was therefore essentially a straightforward agreement for the sale and purchase of the said lands. The only provision for ensuring that the appellants, upon becoming registered owner, would develop the said lands and so fulfil the purpose of their compulsory acquisition was cl. 7(a), by which the plaintiffs irrevocably undertook "To use its best endeavour to promote the sale of the said Lands as a mixed development as 80% thereof to be commercial/industrial and the balance 20% thereof to be residential", but there was no provision as regards the classes of persons to whom the plaintiffs could sell the said lands.

[29] On 10 April 1996 the State Executive Council ("Exco") decided to impose a quota on the sale of lands from the development project on the said lands, the quota being 100% for bumiputeras. This was disclosed in a letter dated 24 May 1996 from the State Government to the defendants. The letter went on

to say that as the Exco had been informed that the plaintiffs had refused to implement the project, on 15 May 1996 the Exco had decided that the defendants should give to the plaintiffs two weeks to confirm whether or not the plaintiffs were still interested to implement the project and that if no reply was received within two weeks the plaintiffs should be treated as no longer interested and the joint-venture agreement (perjanjian usahasama was the term used) would automatically become rescinded or cancelled (terbatal) and the State Government could offer the project to some other agency of the State Government to implement. Accordingly on 29 May 1996 the defendants wrote to the plaintiffs to inform them of the quota decision and to ask them to confirm within two weeks whether or not they were interested to proceed with the development of the said lands.

[30] At the plaintiffs' request made in order to enable them to hold an extraordinary general meeting to obtain the decision of shareholders, the defendants on two occasions extended the period of fourteen days. On the second occasion it was extended to 14 September 1996, and in their letter dated 14 August 1996 granting that extension the defendants said in effect that if by 14 September 1996 there was no decision the defendants would treat the plaintiffs as no longer interested to proceed with the project.

[31] Also on 14 August 1996 the plaintiffs wrote to the defendants to appeal for a reduction of the quota in the manner specified in the letter and on 10 September 1996 the plaintiffs wrote to the defendants to say that if the Exco approved the relaxation of the quota as appealed for, the plaintiffs would implement the project.

[32] As their appeal was pending, by 14 September 1996, the last day for confirming whether or not they wished to continue with the project, the plaintiffs had not held their extraordinary general meeting to obtain the decision of shareholders.

[33] But the defendants did not, in line with the Exco's decision, treat the plaintiffs as not wishing to continue with the project and the agreement as cancelled. Instead, on 3 October 1996 they wrote to the plaintiffs to say that their appeal had been forwarded to the Land Administrator concerned for consideration.

[34] By letter dated 29 October 1997, which was more than a year later, the defendants informed the plaintiffs that the Exco had relaxed the bumiputera quota in a specified manner, but not as

proposed by the plaintiffs. By letter dated 10 November 1997 the plaintiffs pleaded that the quota be reduced further as regards commercial and industrial lots or buildings, as proposed in the letter, but there was no response from the defendants before the plaintiffs wrote to the defendants a month later, on 10 December 1997, to say that they were not interested to proceed with the project and that they accepted the defendants' offer for them to withdraw from the project and to ask when the defendants would refund the sum of RM19,985,153.40 that the plaintiffs had paid. On 9 February 1998 the defendants replied by saying that the plaintiffs' proposal to withdraw from the project was being considered as to its legal implications in the context of the agreement. The plaintiffs replied on 14 February 1998 to emphasize that the withdrawal was not the plaintiffs' proposal but was on an offer by the defendants, and to again ask when the sum of RM19,985,153.40 would be returned.

[35] The defendants finally responded by letter dated 4 June 1998, paras. 2, 3 and 4 of which were as follows:

> 2. Sukacita dimaklumkan bahawa pihak pengurusan Yayasan Melaka telahpun mengkaji kedudukan permohonan penarikan diri oleh pihak tuan bagi pembangunan tersebut di atas seterusnya telahpun mendapatkan pandangan dari Pejabat Penasihat Undang-Undang Negeri Melaka berasaskan kepada surat perjanjian yang telah ditandatangani dan dipersetujui bersama.
>
> 3. Sehubungan dengan itu, pihak pengurusan Yayasan Melaka bersedia untuk membatalkan perjanjian jualbeli bertarikh 27 November, 1995 dan walau bagaimanapun berasaskan klause 9.1 perjanjian tersebut pihak Yayasan Melaka akan melupuskan bayaran 10% daripada harga belian berjumlah RM3,300,859.00 sebagai gantirugi.
>
> 4. Perlu dijelaskan bahawa pertimbangan seperti di atas dibuat setelah meneliti sorotan dari peristiwa yang berlaku melalui surat dari Yayasan Melaka bertarikh 29 Mei, 1996 yang telah memberi pilihan kepada pihak tuan sama ada untuk meneruskan perjanjian yang telah ditandatangani atau disebaliknya. Walau bagaimanapun, setelah melebihi tempoh 14 hari yang telah diberikan, surat tuan bertarikh 10 November, 1997 telah membuat satu cadangan balas (setelah merujuk kepada surat Yayasan Melaka bertarikh 29/10/1997) dan dengan ini bermakna pihak tuan telah tidak bertindak menerima tawaran yang diberikan oleh pihak kami maka surat tuan bertarikh 10 Disember, 1997 tidak boleh dikatakan sebagai

menerima pilihan Yayasan Melaka sebelum ini, dan dengan itu peruntukan klause-klause perjanjian adalah masih terpakai dan perjanjian jualbeli terebut adalah dirujuk.

The defendants eventually refunded RM16,654,294.50, but forfeited RM3,330,858.90 (10%).

[36] To complete the story, I would mention that earlier, on 13 April 1998, the Land Administrator had written to the defendants to convey the State Government's decision to relax further the bumiputera quota in response to the plaintiffs' last appeal of 10 November 1997, but there still remained a small area of difference. Whereas the plaintiffs had, in their last appeal, suggested a bumiputera quota of 20% for the industrial sector, the State Government's decision was 30%. It was also an agreed fact that the Land Administrator's letter of 13 April 1998 (and therefore the decision that it conveyed) was never communicated to the plaintiffs. Neither was it mentioned in the defendant's letter of 4 June 1998.

[37] From paras. 2 and 3 of that letter it is apparent that the defendants treated the plaintiffs' letter of 10 December 1997 as an application by the plaintiffs to withdraw from the project and not as an acceptance of the defendants' offer for the plaintiffs to withdraw. The defendants were prepared to cancel the sale and purchase agreement but would forfeit 10% of the purchase price in reliance on cl. 9.1. Paragraph 4 – in which is to be noted that to the defendants their letter of 29 May 1996 gave the plaintiffs a choice whether or not to proceed with the agreement – sought to explain the reasons for the decision to forfeit. While saying that it was made after perusing the sequence of events from 29 May 1996, the date of the defendants' offer letter, the defendants jumped direct to 10 November 1997, the date of the plaintiffs' last appeal letter, which the defendants treated as making, after the given fourteen days, a counter-proposal to the defendants' offer of 29 May 1996 just because that letter began by referring to the defendants' letter of 29 May 1996. For that reason the defendants took the stand that the plaintiffs' letter of 10 December was not an acceptance of the offer. This is an appropriate juncture to mention that the learned judge said at p. 8 of his judgment, and in submission in the appeal the defendants' counsel also said, that there was no evidence of an offer to withdraw from the defendants. It was an astonishing thing to say when the defendants themselves, in para. 4 of their letter

dated 4 June 1998, described their letter of 24 May 1996 as giving the plaintiffs the choice or option whether or not to proceed with the agreement. That was the offer to withdraw.

[38] The problem in this case arose from the State Government's decision to impose an all-bumiputera quota on the project on the said lands. It was only a decision. The imposition of the quota had not yet been effected. Giving effect to the decision would require some form of legal device. Even in a case where no binding agreement has yet been entered into for a development project where the developer is, or is ultimately to be, the registered owner of the land for the project, it is difficult to see the form of legal device that could be employed to enable a quota to control the subsequent sale of parcels of the land to be implemented and enforced neatly and effectively. But where, as in this case, a binding agreement has been entered into, such a quota cannot validly be imposed – let alone the question of finding the effective legal device for it – without the agreement of the developer. To the learned judge, however, the quota could be imposed in this case. He said at p. 21 of his judgment that the quota had always been within the contemplation of the parties, citing two clauses of the agreement for saying so, namely, cl. 6(3), by which the plaintiffs were to bear all costs and expenses incurred to obtain approval of the layout plan and subdivision of the said lands for the projected development, and cl. 7(b), by which the plaintiffs undertook to comply with all laws affecting the said lands and their development. To me, by no stretch of the imagination would one be able to see from those provisions a contemplation of the imposition of the quota. The learned trial judge also said, at p. 20 of his judgment, that cl. 1.1 was wide enough to enable the quota to be imposed on the titles of the various lots in the project. The part of that clause that was relied upon was that which provided that the said lands were sold "subject to all conditions of title whether express or implied, if any affecting the said lands". That provision was to ensure that it be understood that existing conditions of title would continue to run with the said lands. To my mind it clearly would not enable the defendants to prevail upon the State Government to include in the titles for the said lands, in the hope that it would be viable to give effect to the quota decision, a condition of title that did not exist when the agreement was entered into.

[39] The State Government and the defendants must have realized, when the quota decision was made and the letter of 29 May 1996 was written, that it was not legally possible to impose a quota requirement on the plaintiffs after the agreement had been signed without at least the agreement of the plaintiffs. Behind the quota decision of the State Government and the defendants' letter of 29 May 1996 there must have lain a hope that the plaintiffs would agree to abandon the project so that a new agreement could be entered into with another party, this time with the quota requirement, because the State Government would have been in a real quandary if the plaintiffs had chosen to ignore the quota decision and insisted on performance of the agreement as it stood. In tandem with that hope there must have been a present readiness and willingness to discharge the plaintiffs from their obligations under the agreement. It must have been in view of such considerations that in the High Court and in the appeal before us the plaintiffs' stand, as displayed in their outline of submission in the appeal, and as their foremost argument in the appeal, was that the defendants' letter of 29 May 1996 gave the plaintiffs a choice to withdraw from the contract by reason of the post-contract decision to impose the all-bumiputera quota, an act equivalent to a move by the defendants offering to release the plaintiffs from further performance of the agreement, which in law amounted to a dispensation with the performance of the plaintiffs' obligations under the agreement under s. 64 of the Contracts Act 1950 which states, as far as relevant: "Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him ...". The plaintiffs' counsel submitted that dispensation under section 64 may be a unilateral act not requiring any consideration, that it is not necessary that there be an agreement of dispensation between the parties so long as it is clear that the party dispensing no longer seeks performance and that, after dispensation, the dispensing party cannot rightfully forfeit moneys.

[40] The plaintiffs' counsel did not submit on the question of time limit and the related question of counter-proposal that the defendants, in their letter of 4 June 1996, seemed to place much importance on, and that was presumably because to the plaintiffs' counsel the question of the time limit within which to decide on the defendants' offer of 29 May 1996 was irrelevant because the letter of 29 May 1996 already amounted to a fait accompli dispensation under s. 64. Neither did defendants' counsel, in his

skeletal and oral submissions in answer to the dispensation argument, place any importance on the time limit because his sole reply to the dispensation argument, as was the trial judge's sole reason for rejecting the argument, was to say that s. 64 had no application in this case, not because there was no dispensation, but because cl. 10 of the agreement prevented the construal of the letters between the parties as containing anything amounting to a dispensation. In other words, cl. 10 prevented the giving of a dispensation. Now cl. 10 provided as follows:

> Knowledge or acquiescence by either party hereto [of] or in any breach of any of the conditions or covenants herein contained shall not operate as or be deemed to be a waiver of such conditions or covenants or any of them and notwithstanding such knowledge or acquiescence the parties hereto shall be entitled to exercise their respective rights under this Agreement and to require strict performance by the other of the terms and conditions herein contained.

It gave a party the right to insist on strict performance of a term or condition notwithstanding his knowledge of, or acquiescence in, its breach. Reliance on cl. 10 was, in my view, a poor answer to the dispensation argument because, by its very nature, a right, such as that given by cl. 10, cannot turn into a disability. Clause 10 was not capable of disabling the defendants from exercising the right to give dispensation given by s. 64.

[41] No viable argument having been advanced against it, I was of the view that the dispensation argument, which had its attractions, had to prevail in this case and that therefore the appeal must be allowed.

[42] In any case, cl. 9.1 which the defendants in their letter dated 4 June 1998 relied on for the forfeiture, was not applicable in the circumstances of this case. One of the grounds for forfeiture provided by cl. 9.1, and the ground on which the defendants relied, was the event of the plaintiffs defaulting "in making any payment of the balance of the purchase price ... within the time stipulated in this agreement". As has been seen, there had been no default by the plaintiffs to pay the purchase price. The balance of 40% was not due because Form G had not been issued, as provided in cl. 2(c), which the plaintiffs' counsel, in his outline of submission, said was the nub of the whole case. The learned trial judge, however, at pp. 21 and 22 of his judgment said that the

plaintiffs defaulted in payment of the 40% because by not being interested in proceeding with the project the plaintiffs had no intention to pay the balance in any case. The learned judge erred in that consideration because forfeiture under cl. 9.1 for non-payment was exercisable only upon the occurrence of the default, not upon considerations of a default that must occur in the future. It is noteworthy that although in their letter the defendants cited cl. 9.1 as the basis for the 10% forfeiture, in submission in the High Court and in the appeal their counsel said that it was not the defendants' case that the forfeiture was for non-payment of the balance of the purchase price, but he failed to spell out in the appeal what the legal justification was for the forfeiture.

[43] The only issue in the trial and in the appeal was whether the defendants were entitled under the agreement to forfeit 10% of the purchase price. For the reasons that I have given I was of the view that they were not and that the plaintiffs' appeal should be allowed.